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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 344

MARGARET CONWAY, *Petitioner*,

v.

GEORGE H. O'BRIEN, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
A. Summary Statement of the Matter Involved	1
B. The Basis of the Court's Jurisdiction	8
C. The Questions Presented	8
D. The Reasons Relied on for the Allowance of the Writ	9
Brief in support of Petition for Certiorari	13
Reference to Report of Opinion Below	13
Grounds of Jurisdiction	14
Statement of the Case	14
Errors to be Urged	14
Summary of Argument	15
Argument	17
I. The Circuit Court of Appeals Erred in Holding that the District Court Erred in Not Directing a Verdict for Respondent	17
II. Assuming the District Court Erred in Submitting the Case to the Jury, The Circuit Court of Appeals Erred in Directing Judgment Notwithstanding the Verdict Instead of Directng a New Trial	22
1. The decisions of his Court which led to the adoption of Federal Rule 50 (b) show that motions for judgments notwithstanding verdicts are necessary to the granting of such judgments on appeal	22
2. Rule 50 (b) contemplates motions for judgments notwithstanding verdicts	23
3. This Court has decided that the prior approved practice required motions for judgments notwithstanding verdicts	24

Page

4. The Court below fails in its attempted explanation of its disregard of the requirement of a motion and action in the Court below 25

5. Other Circuit Courts of Appeal have implied that motions for judgments notwithstanding verdicts are necessary to the granting of such judgments on appeal 26

6. The Bar generally has assumed that motions for judgments notwithstanding verdicts are desirable and necessary to the granting of such judgments 28

Conclusion 30

TABLE OF CASES

Aetna Insurance Company v. Kennedy, 301 U. S. 389, 392, 394-395 ..... 10, 11, 24

Anderson v. Olson, 106 Vt. 70, 72 18

Atlantic Coast Line R. Co. v. Linstedt, 184 F. 36, 42. 20

Baltimore & C. Line v. Redman, 295 U. S. 654, 660. 10, 22, 24

Blue Bird Taxi Corporation v. American Fidelity & Casualty Co., 26 Fed. Supp. 808, 810, Dist. Ct. E. D. South Carolina 28

Cline v. Southern Ry. Co., 31 Fed. Supp. Advance Sheets 657, Dist. Ct. M. D. North Carolina..... 28

Dimick v. Schiedt, 293 U. S. 474, 486..... 21

Duncan v. Montgomery Ward & Co., 108 F. (2d) 848 (60 Sup. Ct. 809) 11, 29

Ferro Concrete Const. Co. v. United States, 112 F. (2d) Advance Sheets, 488, 492 C. C. A. 1..... 27

Heisson v. Dickinson, 35 F. (2d) 270, 271..... 20

Johnson v. Joseph Schlitz Brewing Co., 33 Fed. Supp. Advance Sheets, 176, 179, Dist. Ct. E. D. Tennessee S. D. 28

Kelley v. Anthony, — Vt. 1939, 8 Atl. (2d) 641..... 18

Kreigh v. Westinghouse C. K. & Co., 214 U. S. 249, 253 258 19

Leader v. Apex Hosiery Co., 108 F. (2d) 71, 74, C. C. A. 3 26

Limbershaft Sales Corporation v. A. G. Spalding & Bros. 111 F. (2d) Advance Sheets 675, 678....11, 29

Page

Lowden v. Denton, 110 F. (2d) Advance Sheets, 274, 278 C. C. A. 8 27
Massachusetts Protective Ass'n v. Mouber, 10 Fed. (2d) Advance Sheets, 203, 204, 207, C. C. A. 8.... 26
Miller v. Erickson, 76 F. (2d) 598, 599..... 20
Ocean Accident & G. Corp. v. Moore, 85 F. (2d) 369, 370 21
Payne v. Colvin, 276 F. 15, 16 20
Pessagno v. Euclid Investment Company, 68 Washington Law Reporter, 753..... 29
Powers v. Lackey, 109 Vt. 505 18
Pruitt v. Hardware Dealers Mut. Fire Ins. Co., 112 F. (2d) Advance Sheets, 140, 143, C. C. A. 5.....28, 29
Reliance Life Ins. Co. v. Burgess, 112 F. (2d) Advance Sheets, 234, 240, C. C. A. 8 27
Shaw, Admr. v. Moore, 104 Vt. 529, 86 A. L. R. 1139.. 18
Slocum v. New York L. Inc. Co., 228 U. S. 364, 400.. 22
The Richmond & Danville R. R. Co. v. Powers, 149 U. S. 43, 45 .....19, 20
Tompkins v. Erie R. Co., 90 F. (2d) 603, 605 20

OTHER CITATIONS.

American Bar Assn., Washington and New York Proceedings of Institutes Federal Rules of Civil Procedure, pp. 86-87, 282-284 29
Rules of Civil Procedure, District Courts of the United States, 50 (b) quoted in full at page 6
6, 10, 15, 22 *et seq.*
Vermont "guest-occupant" statute 2

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MARGARET CONWAY, *Petitioner,*

v.

GEORGE H. O'BRIEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS

May It Please the Court:

The petition of Margaret Conway respectfully shows to the Court:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner, plaintiff-appellee below, a citizen of New Hampshire, recovered judgment against the respondent, defendant-appellant below, a citizen of Vermont, in the United States District Court for the District of Vermont sitting at Montpelier, on the verdict of a jury, for damages

for personal injuries resulting from respondent's negligence in driving an automobile in which petitioner was a passenger, at Rockingham, Vermont.

In view of the "guest-occupant" law of Vermont (Section 5113 of the Public Laws of Vermont, 1933, quoted below*) petitioner could recover only if respondent was grossly negligent.

At the conclusion of the evidence, the respondent had moved for a directed verdict. The Circuit Court of Appeals for the Second Circuit, in the decision now sought to be reviewed (R. 184), held that the jury had before them sufficient evidence to hold that respondent was negligent but not that he was grossly negligent, and therefore that a verdict for respondent should have been directed. Having so decided, the Circuit Court of Appeals reversed, and remanded the cause, not for a new trial, but for the entry of final judgment for defendant, though no motion for a judgment despite the verdict had been made nor did the record show any consideration by the District Court subsequent to the verdict of the question which had been raised by the motion for a directed verdict.

Petitioner recognizes that in some cases evidence sufficient to take the issue of negligence to the jury may fall short of that sufficient to prove gross negligence so that a directed verdict is proper, but the settled rule is that on such motions the evidence should be viewed in the light most favorable to plaintiff. The Circuit Court of Appeals did not mention this rule but violated it and invaded the province of the jury. Petitioner further concedes that an overruled point that a verdict should have been directed

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*Sec. 5113; LIABILITY OF OPERATORS TO GUEST OCCUPANTS; EXCEPTIONS. The owner or operator of a motor vehicle shall not be liable in damages for injuries received by any occupant of the same occasioned by reason of the operation of such vehicle unless such owner or operator has received or contracted to receive pay for the carriage of such occupant, or unless such injuries are caused by the gross or wilful negligence of the operator.

may be saved and renewed by a motion for judgment. But this was not done here. The result,—the order for the entry of judgment contrary to the verdict,—deprives petitioner of her right of trial by jury, contrary to the Seventh Amendment.

The opinion of the Circuit Court of Appeals gives the general outline of the facts, though it understates some upon which petitioner relied, and chooses between the conflicting testimony a version of the accident different from that which it may be fairly assumed the jury believed. The testimony tended to show the following facts, many of which, it will be noted from the record references, are accepted by the Circuit Court of Appeals:

On August 27, 1936, petitioner was riding as a guest passenger in the automobile of respondent from North Walpole, New Hampshire, bound for Rockingham, Vermont. Respondent's automobile collided with an automobile driven by one Ralph A. Wilson, of Rockingham, Vermont, who was bound in the opposite direction. Respondent was driving down hill (9% grade, R. 37, 182) on a narrow dirt and gravel road, a public highway, (R. 39, 129, 132, 138) around a sharp curve to the left (R. 36, 130, 37, 182; 60° or 70° angle, R. 41, 181) on the left or wrong side of the center of the road (R. 101, 181) approaching the Southerly end of the Williams River Bridge, which was a narrow covered bridge (R. 181, 47, 107), with his view obscured by the curve in the road and by bushes which lined the left side of the road (R. 104, 105, 137) until within two car lengths of the Southerly entrance to the bridge. The collision occurred about twenty feet from this end of the bridge (R. 181).

The other automobile driven by Wilson was approaching across the bridge and emerging from it prudently in second gear (R. 105) at a pace of not exceeding two miles an hour (R. 114), as the jury may be presumed to have found upon the evidence, though respondent attributed to Wilson much greater speed (R. 146, 149) and the Circuit Court of Appeals rejected two miles an hour as incredible (R. 182). Wilson had as a precaution blown his horn upon entering

and again before emerging from the South end of the bridge (R. 58, 100, 101, 102, 182) and was on the far right of the roadway of the bridge and the far right of the road as it curved from the exit of the bridge, close to the guard rail at the point of the accident (R. 67, 101, 147, 148).

Respondent was well acquainted with the curve, at the point of accident (R. 183) having much traveled there (R. 133, 137, 138, 140), passing other cars there on other prior occasions (R. 140). He well knew the danger of meeting another car and well knew he could not safely pass any moving car at this point unless he were travelling at "a snail's pace" (R. 140, 141, 183). He also well knew that on previous occasions he had been required to stop completely at that point to permit other automobiles to pass safely (R. 140); he knew he was travelling faster than a "snail's pace" (R. 141), that the road was narrow (R. 140, 104, 36, 120), that the easterly shoulder of the outer curve was inclined to be wet (R. 132); he did not slow the car speed (R. 141) until too late to avoid the collision (R. 182) although he knew that other cars might be travelling at this point at the time (R. 138).

Petitioner could not drive an automobile, and though she was asked, she could not estimate respondent's speed. Petitioner could only say there was an "awful crash" (R. 67). There was testimony as to comparative speed for consideration by the jury in the fact that the left front of respondent's Ford struck the left front of Wilson's Dodge with such force as to drive it backward through the guard rail, breaking it, at the (respondent's left) inside of the curve (R. 102, 104). Respondent undertook to estimate his speed in miles per hour, and he said it was fifteen (R. 140, 141). The Circuit Court of Appeals accepted this testimony as correct (R. 182, remarking cryptically and mistakenly that there was "curiously enough no dispute" about this), though as above noted it rejected Wilson's testimony that he was going not over two miles an hour. From respondent's point of view, Wilson's apparent speed would be of

course the sum of respondent's speed plus Wilson's speed. Respondent's own testimony (repeated) that he saw Wilson's car "shoot out" in front of him (R. 147) and his insistence, contrary to Wilson's testimony, that Wilson was going fast (R. 146, 149) is therefore evidence of his own excessive speed. However, any inference from circumstances is less important, because the jury heard direct contradiction of respondent's testimony as to his speed. Wilson testified that respondent's speed was more than fifteen miles an hour (R. 114). The Circuit Court of Appeals' assumption that no jury could properly find that respondent's speed exceeded that admitted and its statement that there was no dispute are clear errors. And, though it mistakenly brushed Wilson's speed aside as immaterial (R. 182), its decision was plainly enough based on its conclusion about respondent's speed (R. 184).

The testimony as to these facts was taken before the trial judge and jury during the three days, August 1 to August 3, 1939. At the close of the evidence, the respondent moved the Court to direct a verdict in his favor on the ground that the evidence did not establish gross negligence on his part nor raise a question upon which the minds of reasonable men might differ, as gross negligence is defined in the Vermont cases; the motion was overruled (R. 156). The District Judge submitted a copy of his proposed charge to the jury to counsel; and counsel for petitioner and respondent, respectively, submitted their requests in the form of proposed changes in the Court's charge (R. 157, 158).

The issues were given to the jury the following day, August 4, 1939, by a charge by the District Court which distinguished between ordinary and gross negligence and defined the latter in manner consistent with the Vermont cases, and no question has been made as to the correctness or sufficiency of the Court's charge in this regard (R. 162). After their initial consideration of the case, the jury returned to the courtroom and requested that they be given and were given further instructions by way of definition

and illustration of gross negligence, as to which further instructions no question arises (R. 163). After further consideration, the jury found for the plaintiff and assessed damages. Judgment was thereupon, without the interposition of any objection, entered for the petitioner upon the verdict, August 4, 1939 (R. 165, 167).

Rule 50(b) of the Federal Rules of Civil Procedure is quoted in the margin.*

No motion was made by the respondent as permitted by this rule to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for a directed verdict, within ten days after the reception of the verdict or at any time, nor was any action of any kind taken until the taking of an appeal to the Circuit Court of Appeals, nor was there then any action other than the taking of the appeal and the making up of the record on appeal. The only indication in the record of the possible expectation of respondent as to the future of the cause is in the fact that in a stipulation providing for the omission from the record of evidence relating to damages, this was recited to be without prejudicing the rights of the respondent upon

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**Rules of Civil Procedure for the District Courts of the United States:* Rule 50(b). "Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

any subsequent trial to contest the amount, character and extent of the damages claimed to have been suffered by the petitioner (R. 173).

There was no indication in these proceedings looking to an appeal that respondent was seeking in the Circuit Court of Appeals anything other than a conventional reversal and new trial.

Respondent's brief in the Circuit Court of Appeals is, of course, not a part of this record, but it seems not improper to mention and will doubtless be conceded by respondent that it contains no argument or request for the entry of a judgment for respondent notwithstanding the verdict and concludes with the conventional prayer that the judgment of the lower court "be reversed" without more.

The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case, not for a new trial, but with instructions to enter final judgment for the defendant (R. 181, 185).

This opinion, in effect, was that the difference between ordinary negligence and gross negligence is a matter of degree concerning which there is no universally applicable formula but that each case must be separately considered upon its own facts. The court recited its version of the facts and found they constituted only ordinary negligence. The facts which the court found could have been found by the jury on the testimony. It certainly can not be said, however, that the facts which the Court found were those most favorable to the plaintiff which could be founded upon the testimony. It certainly has been the long settled law that the verdict of a jury is not to be directed, or upset, unless the latter is true.

The only justification given by the Circuit Court of Appeals for its invasion of the province of the jury with respect to the credibility of the testimony is its remark that the issue as to Wilson's speed was not important as it did not count in determining respondent's negligence (R. 182). The Court does not notice that respondent O'Brien himself

expressed the more natural view that it took greater negligence to produce a collision with a slow moving car than with one approaching rapidly around this blind curve, and defended himself by attributing a rapid speed to Wilson's car (R. 146, 147, 149).

In justification for the decision to direct the dismissal of the complaint instead of a new trial, the Circuit Court of Appeals states, in effect, that the procedure outlined in Rule 50 (b) need not be followed in order that the Circuit Court of Appeals may adjudge that a motion for judgment despite the verdict (never made here) should have been granted. The learned Court cites in support of this position cases in the Third and Eighth Circuit in each of which, however, the litigant in the position of the respondent had availed himself of the permission given by rule 50 (b) and made the motion contemplated by that Rule in the District Court. These cases and the Court's reasoning are more fully discussed in the brief in support hereof (pp. 25, 26).

B. THE BASIS OF THE COURT'S JURISDICTION.

It is competent for this Court to require by certiorari that this cause be certified to it for determination pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 U. S. C. A., Section 347.

C. THE QUESTIONS PRESENTED.

Two separate and wholly independent questions are presented.

1. Whether the Circuit Court of Appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment of the Federal Constitution in determining that there was no evidence upon which the jury might find the respondent to be guilty of gross negligence, principally by disregarding as incredible, testimony which the jury may

have believed as to the speed of Wilson's car and accepting as conclusive testimony of respondent as to his own speed, which in the light of other evidence, the jury may not have believed, thus usurping the functions of the jury by invading their exclusive province with respect to the testimony.

2. Whether the new Federal Rule 50 (b) which expressly provides that whenever a motion for directed verdict at the close of the evidence is denied, the Court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion, and which further provides that within ten days after the reception of the verdict, the party who has moved for a directed verdict may move to have the verdict and judgment thereon set aside and to have judgment entered in accordance with his prior motion, is to be construed as though it provided that if the party does not within ten days or at any time after the return of the verdict move to set the verdict and judgment aside and to have contrary judgment entered, such a motion shall, nevertheless, be deemed to have been made and denied. Otherwise expressed, whether a party need not seek a judgment *non obstante veredicto* in the District Court, nor the District Court consider the entry of one, in order to found a direction by the Circuit Court of Appeals that such a judgment should have been entered in the District Court, thus attributing to the District Court error in failing to do what the District Court was not asked to do.

D. THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. It is important, in order that trial by jury may be preserved as intended by the Seventh Amendment, that this Court shall determine whether a Circuit Court of Appeals may determine that a verdict should have been directed, by finding facts (and determining that they do not constitute gross negligence) which are less favorable to petitioner

than those which might have been found by the jury on the evidence.

2. The decision sought to be reviewed determined a novel and important question arising under Rule 50 (b) of the new Federal rules in a way probably in conflict with the decision of this Court, *Aetna Insurance Company* v. *Kennedy*, 301 U. S. 389, 395, which dealt with the State practice after which this rule was modelled.

Other Circuit Courts of Appeal which have reviewed motions for judgments contrary to verdicts made in District courts pursuant to this Rule 50 (b), have plainly implied that they consider the making of such motions in the District Court after verdict as provided by the Rule and actions by the District Court granting or refusing such motions, to be indispensable to affirmance or reversal of the actions of the District Court on such motions. (See brief in support here, p. 26.)

This new rule provides an instrumentality by which, without loss of opportunity to take the verdict of the jury, the sufficiency of the evidence may be reexamined after the trial by the trial judge and his conclusion may be reviewed on appeal, with like effect as though the jury had been detained to await a directed verdict. This procedure, sanctioned when authorized by State practice, in *Baltimore and C. Line* v. *Redman*, 295 U. S. 654 (as was said in that case, p. 660) "came to be supported on the theory that it gave better opportunity for considered rulings." It should not be so loosely administered that the parties availing themselves of the rule shall not be required to take the step plainly indicated by the rule viz., a motion for judgment subsequent to the verdict, by which alone the trial court is given the "better oportunity" to make the ruling in advance of the appeal. A plaintiff for whom a verdict has been rendered and judgment entered, and the trial judge, should both be given opportunity in the trial court to deal with a claim for a judgment *non obstante veredicto* which

oftentimes presents a situation where a trial judge in his discretion may order a new trial, before the case is taken into an Appellate Court, the discretion of which as to new trials is less broad. In any event, the decision of this Court in *Aetna Insurance Co.* v. *Kennedy* (*supra*), indicated that a failure to make an appropriate motion in the trial court would be an insuperable bar to the entry by the Appellate Court of judgment other than for new trial.

A kindred question arising under Federal Rules 50 and 59 is about to be considered by this Court, certiorari having been granted April 8, 1940 (60 Sup. Ct. 809, the case below being *Duncan* v. *Montgomery Ward & Co.*, 108 F. (2d) 848), the kindred question being whether a new trial may be directed by the Circuit Court of Appeals on the reversal of a judgment *non obstante veredicto* entered upon motion to that effect duly made in the District Court, coupled with a motion for a new trial made in such form as to raise a question whether it remained in the case after the grant of the motion for judgment *non obstante veredicto*.

Since the promulgation of the new rules, the understanding of the bar generally has been that to invoke the provisions of Rule 50 (b) in this regard, it is necessary for a party against whom a jury has found to make subsequent to a verdict a motion to vacate the verdict and judgment and to have contrary judgment entered. The making of such motions is mentioned in all of the reported cases to date arising under this rule with the exception only of the case at bar and a case decided a few days thereafter by the Circuit Court of Appeals for the Second Circuit, on the authority of the case at bar, *Limbershaft Sales Corporation* v. *A. G. Spalding & Bros.*, 111 Fed. (2d) Advance Sheets 675. If motions being made by the bar generally need not be made, and if it is not necessary to give one's opponent a day in Court on such motions in the District Court, before invoking final action by the Appellate Court as though such motions had been made in the District Court, such a construction of the Federal Rule and departure

from the principles heretofore settled by this Court in respect of the prior similar practice, is important and should be settled by this Court.

WHEREFORE, the petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the Second Circuit in the case entitled *Margaret Conway, Plaintiff-Appellee,* v. *George H. O'Brien, Defendant-Appellant,* No. 287, in order that said case may be reviewed and determined by this Honorable Court.

MARGARET CONWAY,

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IN THE

Supreme Court of the United States

October Term 1940.

No.——

MARGARET CONWAY, *Petitioner,*

vs.

GEORGE H. O'BRIEN, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

REFERENCE TO REPORT OF OPINION BELOW.

This case in the District Court was not reported. In the Circuit Court of Appeals for the Second Circuit it is reported in 111 F. (2d) Advance Sheets 611.

GROUNDS OF JURISDICTION.

This Court has jurisdiction pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 U. S. C. A., Section 347.

STATEMENT OF THE CASE.

Reference is respectfully made to the "Summary Statement of the Matter Involved" in the petition in support of which this brief is filed.

ERRORS TO BE URGED.

(1) The court erred in finding error in the submission of case to the jury on the issue of gross negligence by assuming the facts less favorable to plaintiff-petitioner than the jury could find from the evidence.

(2) The Court erred, having found error in the submission of the case to the jury, in directing the entry of judgment for defendant-respondent instead if new trial.

SUMMARY OF ARGUMENT.

I. The Circuit Court of Appeals Erred in Holding That the District Court Erred in Not Directing a Verdict for Respondent.

Upon admitted facts, if reasonable men might differ as to whether the negligence was gross, the question was for the jury. Here facts were in dispute upon which the degree of negligence depended and facts were assumed by the Circuit Court of Appeals less favorable to petitioner than the evidence warranted.

II. Assuming the District Court Erred in Submitting the Case to the Jury, the Circuit Court of Appeals Erred in Directing Judgment Notwithstanding the Verdict Instead of Directing a New Trial.

In order that the sufficiency of evidence may be reexamined after verdict looking to a judgment notwithstanding a verdict, without new trial, not only must some appropriate means be taken to reserve the point before submission to the jury but the point must by some appropriate means be submitted to the trial judge after verdict and be by the trial judge considered or refused consideration. A benefit of this procedure stressed by the authorities, is that it gives the trial judge an additional and unhurried opportunity to pass on the point.

Under Federal District Court Rule of Practice 50 (b), a motion for directed verdict automatically reserves the point, but does not automatically invoke the action of the trial judge upon the reserved point. This is done by the party against whom the jury has found, if he still conceives himself entitled to a judgment notwithstanding the verdict. Since this was not done here, the error before the Circuit Court of Appeals was only error in the course of the trial, upon which retrial only may be ordered.

Under the similar prior practice following state practice this court has decided a motion for judgment non obstante veredicto, acted upon by the District Court, is essential to found an affirmance or reversal of such action by the Circuit Court of Appeals.

The opinions of Circuits other than the Second imply that such a motion is essential under Rule 50 (b). The general practice and opinion at the bar is in accord.

ARGUMENT.

I. The Circuit Court of Appeals Erred in Holding That the District Court Erred in Not Directing a Verdict for Respondent.

The Circuit Court of Appeals erred in finding that Wilson's automobile with which respondent collided, was not approaching as slowly as he testified, not over two miles an hour, and that respondent's automobile was going only fifteen miles an hour as respondent testified, contrary to the circumstances and to the direct testimony of Wilson. Both these facts were material in the question of gross negligence. The Circuit Court of Appeals concedes that respondent's speed was material, for the opinion where it concludes that only a "routine dereliction" had been proven, states (R. 184):

> "Had he (respondent) been driving twice as fast * * * we might think otherwise."

The jury, having returned a verdict for plaintiff under instructions which properly defined gross negligence, must be presumed to have found the facts most favorable to the plaintiff. It must be presumed to have found excessive speed on the part of the respondent which, with the other circumstances, made it practically impossible for respondent to avoid collision with a car approaching so slowly as to be comparatively stationary on its own side of the road. If the facts were as the jury may on the evidence have believed them to be, gross negligence was proven.

The remark of the Circuit Court of Appeals above quoted is a practical admission of this. It may therefore be unnecessary (as it does not directly bear upon the point we press here) to point out that the Vermont decisions differentiate between "momentary inattention, error of judgment or loss of presence of mind," on the one hand, and the driving of a car before the emergency arises so fast, or so in disregard of lack of vision or of other

possible traffic, as to constitute a more deliberate or continuing disregard of known danger; on the other hand. The former is ordinary negligence, the latter may be gross. In *Powers* v. *Lackey,* 109 Vt. 505, the lack of visibility was caused by fog, here by the turn and bushes, and in both the driver was on the left of the road, and in the case cited the above distinction was made. It is repeated in almost the same words in cases relied on by both sides, such as *Anderson* v. *Olson,* 106 Vt. 70, 72, *Kelley* v. *Anthony,* Vermont, 1939, not yet officially reported, 8 Atl. (2d) 641. In the latter case the Court said:

> "The roads in this state are filled with curves of varying degrees. To enter some of them at the speed and in the manner indicated by the evidence might well warrant a submission of the issue in question and this would be particularly so in cases of accidents resulting from approaching traffic."

The District Court's instructions to the jury (R. 159) closely followed *Shaw, Admr.* v. *Moore,* 104 Vt. 529, 86 A. L. R. 1139.

Even if the facts were as assumed by the Circuit Court of Appeals, the issue of gross negligence properly went to the jury. Even fifteen miles an hour at that place on the wrong side of the road, driving into the unseen where other cars might lawfully be approaching and where the danger was fully known to the driver, is not so clearly only ordinary negligence that a jury may not find it gross. The twelve Vermont men from the vicinity thought the negligence was gross. The trial judge thought the evidence sufficient to submit. The point of view of a New York City judge, accustomed to broad highways where when traffic proceeds at all the road is designed to make fifty miles an hour safe, should not control as to what is only ordinary negligence on this kind of a Vermont road. It is natural that fifteen miles an hour on a country road would seem slower to a city man than to the Vermont jury.

This court in *The Richmond & Danville R. R. Co.* v. *Powers*, 149 U. S. 43, 45, said:

> "It is well settled that where there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

But in the instant case, not only were the conclusions to be drawn from undisputed facts in dispute, but the facts themselves. The Circuit Court of Appeals has undertaken to weigh the evidence and pass on credibility, and to resolve disputed facts bearing on negligence against the contentions and evidence sustaining the party for whom the jury found.

This is such a departure "from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." (Rule 38, 5 (b)).

This Court said in *Kreigh* v. *Westinghouse, C. K. & Co.*, 214 U. S. 249, 253, 258:

> "The testimony shows, and, in deciding a question of this character, the view must be taken of it most favorable to the plaintiff, that he was * * *"
>
> "Questions of negligence do not become questions of law, to be decided by the court, except 'where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish'. Gardner v. Michigan C. R. Co. 150 U. S. 349, 361, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140."

What has just been quoted is quoted as "too well settled in the federal practice to admit of serious controversy" by the Circuit Court of Appeals for the Fourth Circuit in

Atlantic Coast Line R. Co. v. *Linstedt*, 184 F. 36, 42, decided in 1910.

The Circuit Court of Appeals for the Seventh Circuit says tersely in *Payne* v. *Colvin*, 276 F. 15, 16, decided in 1921, "Weight and credibility are not reviewable."

The Circuit Court of Appeals for the First Circuit, in *Heisson* v. *Dickinson*, 35 F. (2d) 270, 271, decided in 1929,

> "Upon questions of negligence, a case should not be withdrawn from the jury, unless the conclusion follows as a matter of law that no recovery can be had upon any view which can properly be taken of the facts which the evidence tends to establish."

The Circuit Court of Appeals for the Second Circuit, the court of the case at bar, in *Miller* v. *Erickson*, 76 F. (2d) 598, 599, decided April 1, 1935, said:

> "The judgment against Erickson appears to us justified. He was driving a motorcar at a speed of at least twenty-five miles an hour through a village at night in a thick snowstorm, when by his own statement he could not see ahead more than sixty or seventy feet. That meant that he had less than two seconds in which to stop. He struck a car at rest with its tail light on, and drove it forward twenty feet. 'Gross negligence,' as the courts of Vermont have construed it, means in substance that the defendant conducts himself with utter recklessnes of the safety of others. A jury might well believe that Erickson had done so. We think so ourselves."

The same court, in *Tompkins* v. *Erie R. Co.*, 90 F. (2d) 603, 605, where the facts relied on to prove contributory negligence were to the extent referred to in what we quote, undisputed, the court cited this court's decision in *Richmond & Danville R. Co.* v. *Powers, supra*, to the statement:

> "To us it would seem imprudent to walk, or even to stand, in the dark within a foot of a train moving at the rate of 10 miles an hour; but the fact that recoveries have been allowed under closely similar circumstances

in the cases above cited indicates that fair-minded men may hold a different view. This is enough to preclude taking the issue from the jury."

The Circuit Court of Appeals for the Eighth Circuit, in *Ocean Accident & G. Corp.* v. *Moore,* 85 F. (2d) 369, 370, decided August 13, 1936, said:

> "We do not weigh the evidence, but under the well-settled rule consider the evidence from the standpoint most favorable to the plaintiff because all disputed questions of evidence have been resolved by the verdict of the jury against defendant."

There are no decisions to the contrary. The invasion by the court below of the exclusive province of the jury to weigh conflicting evidence and to decide its credibility was, we believe, inadvertent. That fact, however, does not alter the petitioner's rights, nor does it diminish petitioner's expectation that a principle so well settled in this court will be reaffirmed by a review of the decision in this respect as well as in respect to the important and independent ground yet to be discussed.

As this court said in *Dimick* v. *Schiedt,* 293 U. S. 474, 486:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

II. Assuming the District Court Erred in Submitting the Case to the Jury, the Circuit Court of Appeals Erred in Directing Judgment Notwithstanding the Verdict Instead of Directing a New Trial.

1. The decisions of this Court which led to the adoption of Federal Rule 50 (b) show that motions for judgments notwithstanding verdicts are necessary to the granting of such judgments on appeal.

Assuming, contrary to our contentions, that there was not sufficient evidence to take the case to the jury on the issue of gross negligence, we respectfully submit that the judgment of the Circuit Court of Appeals should have been reversal and order for new trial. This, because the only error in the record was one occurring in the course of the trial, viz., the denial of the motion for directed verdict. There was no error by way of refusal to vacate the verdict (and judgment) and enter judgment for respondent, because the District Court does not appear to have refused so to do. By no procedure, formal or informal, was the District Court's consideration directed to the making of such an order as the mandate of the Circuit Court of Appeals now directs that the District Court make.

New Federal Rule 50(b) makes universally possible in federal practice the substance of the procedure approved in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, and in the dissenting opinion of Chief Justice Hughes in *Slocum* v. *New York L. Ins. Co.*, 228 U. S. 364, 400. The discussion in the Chief Justice's opinion is more full, and is prophetic of the adoption of a federal rule. He discusses the manner by which sufficiencies of evidence have been challenged in common law courts, and the points so raised preserved and disposed of post-verdict with like effect as though determined before submission of cases to juries. He makes plain that whether the means be a "demurrer to the evidence," a motion for a directed verdict, a conditional taking of a verdict with reserved questions of law, a motion for a

judgment *non obstante veredicto,* a motion in arrest of judgment, or statutory equivalents or enlargements of these common law conceptions, the substance remains the same. That substance is that the error in the grant or denial of a directed verdict is an error in the course of the trial, redressable only by the vacation of the trial and a new trial, unless means are taken to bring the matter into the record for disposition by the judge after the trial.

This is accomplished in all of the illustrations given in this learned opinion by steps in substance as follows: (1) reservation of the point when the case is submitted to the jury, and (2) submission of the point to the judge for decision after the verdict. The means by which these two steps have been accomplished have varied, some of them have been statutory, but without the substance of these two steps an erroneous submission to the jury has not been held, in the precedents collated in this opinion, more than an error in the course of trial calling for a new trial.

What is lacking in the present record is the second of the two steps, which the review of the authorities made in the opinion shows to have been invariably taken to get into the record a ruling (for or against a judgment) on the affirmance or reversal of which, judgment could properly be directed in the Appellate court. There was no submission to or consideration by the District Court after the verdict of the question whether judgment should despite the verdict be entered for the defendant.

2. Rule 50 (b) contemplates motions for judgments notwithstanding verdicts.

The Federal Rule 50(b) is merely an instrumentality to accomplish the reform which had been local to the states, notably Pennsylvania and New York, from which these leading cases came.

It provides a means by which the two steps are taken to get into the record on appeal the question whether a final judgment contrary to the verdict and judgment below

should be entered. The first step, the reservation of the point or the conditional submission to the jury, is made automatic and implied in the denial of a motion for a directed verdict. The second step is to be taken by the party against whom the ruling was made on the motion for directed verdict. He may move within ten days for a judgment in accordance with his prior motion for a directed verdict. The rule, which so expressly supplies the reservation, does not supply the motion for judgment.

If no motion for judgment is made, then the purposes of this procedure, as explained in *Baltimore & C. Line,* v. *Redman, supra,* 295 U. S. 654, 660, viz., that it "gave better opportunity for considered rulings," is defeated. There is no unhurried second opportunity for the trial court to rule on the sufficiency of the evidence. It must be the trial court that is referred to, as the appellate court's oportunity for consideration of the sufficiency of the evidence was as good and as unhurried before the rule as after, with different consequences, however, if the matter has been brought into the record on review by the grant or denial of a motion after verdict for judgment below.

3. This Court has decided that the prior approved practice required motions for judgments notwithstanding verdicts.

The question above discussed has been decided by this court as if arose under the prior analagous state practice. This court has held that where the motion in the nature of a motion for judgment *non obstante veredicto* was not made in the District Court, that fact is reason for denying to the Circuit Court of Appeals power on such a record to order judgment contrary to the verdict below. The case is *Aetna Insurance Co.* v. *Kennedy,* 301 U. S. 389, 392, 394-395. The point appears from the following from this Court's opinion:

> "The court refused to direct for plaintiff or defendants and, without reserving for later consideration

the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants."

* * * "The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the Circuit Court of Appeals. In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."

4. The Court below fails in its attempted explanation of its disregard of the requirement of a motion and action in the Court below.

The Circuit Court of Appeals in the case at bar supported its disregard of the lack of a motion for judgment in accordance with the denied motion for a directed verdict, and the lack of any consideration or action by the trial court subsequent to verdict, by saying that it was not necessary that the trial court should deny "the motion once again" (R. 184).

The Court's expression was inaccurate. "The motion" the District Court had denied was for a directed verdict, made in the course of the trial. "The motion" which was

neither made nor denied was one, in the words of this rule, "to have judgment entered in accordance with his motion for a directed verdict." Something "in acordance with" another thing is not the thing with which it is in accordance. The Circuit Court continued "his (the District Judge's) failure to vacate his first order is enough." It is respectfully disputed that the absence of something from the record, expressed as a "failure" to vacate an order, is equivalent to an order denying a motion not made, on which to predicate error.

5. Other Circuit Courts of Appeal have implied that motions for judgments notwithstanding verdicts are necessary to the granting of such judgments on appeal.

The Court cites in support of its elision of the necessity for consideration and action by the District Court on such a motion for judgment *Leader* v. *Apex Hosiery Co.*, 108 F. (2d) 71, 74, C. C. A. 3, and *Massachusetts Protective Ass'n.* v. *Mouber*, 110 F. (2d) Adv. Sheets, 203, 204, 207, C. C. A. 8. In the former case the Court said, page 74:

> "The appellants filed motions to set aside the verdict and judgment and moved for a new trial. These motions were denied by the trial judge and the present appeal was taken."

In the latter case the Court said, pages 204, 207.:

> "The court denied the motion, and the jury returned a verdict for plaintiff. Thereafter, within ten days, pursuant to Rule 50 (b) * * * the defendant moved to set aside the judgment and verdict for plaintiff and for the entry of judgment in its favor upon the same grounds as were urged in support of its motion for a directed verdict. The court overruled this motion for judgment notwithstanding the verdict." * * *
>
> "The plaintiff argues that if there is a reversal, the case should be sent back for a new trial—citing Slocum v. New York Life Ins. Co., 228 U. S. 364. Under the rule announced by the Supreme Court of the United

States in Baltimore & C. Line, Inc. v. Redman, 295 U. S. 654, as implemented by Rule 50 (b) * * * the defendant, we think, is entitled to have judgment entered in its favor, the court below having erred in denying the defendant's motion for a directed verdict, and having also erred in not granting judgment notwithstanding the verdict."

It is respectfully submitted that neither of the cases cited by the court as precedents for considering the motion for judgment contemplated by Rule 50 (b) as unnecessary to a direction for judgment by the appellate court, sustains the proposition, but rather the contrary.

Evidencing or at least implying a view contrary to that of the Second Circuit, we cite from other circuits the following additional recent cases:

Ferro Concrete Const. Co. v. *United States,* 112 F. (2d) Advance Sheets, 488, 492, C. C. A. 1, where the court said:

> "The defendant having moved seasonably that the verdict and judgment thereon be set aside and to have judgment entered in accordance with its motion for a directed verdict, there is no occasion for a new trial of the issues involved in the plaintiff's claim."

Lowden v. *Denton,* 110 F. (2d), Advance Sheets, 274, 278, C. C. A. 8, where the court said:

> "In this instant case, the defendants have meticulously complied with the provisions of this Rule (50(b)) of court, and hence, on the record now before us and under the circumstances disclosed thereby, are entitled on reversal to have the case remanded with directions to enter judgment for the defendants."

Reliance Life Ins. Co. v. *Burgess,* 112 F. (2d) Advance Sheets, 234, 240, C. C. A. 8, where the court said:

> "Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. It follows that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment for

the plaintiff. Rule 50, Rules of Civil Procedure; Massachusetts Protective Assn. v. Mouber, 8 Cir., 110 F. 2d 203; Lowden v. Denton, 8 Cir. 110 F. 2d 274."

Pruitt v. *Hardware Dealers Mut. Fire Ins. Co.*, 112 F. (2d) Advance Sheets 140, 143, C. C. A. 5.

6. The Bar generally has assumed that motions for judgments notwithstanding verdicts are desirable and necessary to the granting of such judgments.

Not only does this appear from the Circuit Court of Appeals cases cited under the last heading but also from the District Court reports. Recent cases are:

Blue Bird Taxi Corporation v. *American Fidelity & Casualty Co.*, 26 Fed. Supp. 808, 810, Dist. Ct. E. D. South Carolina, where the court said:

> "At the conclusion of the testimony, defense counsel moved for a directed verdict.
>
> * * * * *
>
> "The jury was discharged from further consideration of the case in order that the court might further consider the effect of the Tyger River Co. decision, and the relation of the case at bar to the facts there. This action was taken under the provisions of Rule 50 (b) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and within ten days thereafter, counsel for the defendant indemnity company moved for judgment in accordance with its motion for a directed verdict."

Cline v. *Southern Ry. Co.*, 31 Fed. Supp. Advance Sheets 657, District Ct. M. D. North Carolina.

Johnson v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. Advance Sheets 176, 179, Dist. Ct. E. D. Tennessee, S. D.

No cases arising under the Federal Rule 50(b) have been found indicating that a motion in the nature of a motion for judgment notwithstanding the verdict is unnecessary in order to predicate error on the failure to enter such judg-

ment, excepting the case at bar and a case following and citing it, in the Second Circuit, *Limbershaft Sales Corporation* v. *A. G. Spalding & Bros.*, 111 F. (2d) Advance Sheets 675, 678.

The proper practice, as we see it, is very simply stated by District Judge W. Calvin Chestnut as reported in the Washington and New York 1938 Proceedings of Institutes, Federal Rules of Civil Procedure, American Bar Association, at pages 86 to 87; also by former Attorney General Mitchell who refers to the submission of the draft of this rule to this court, at pages 282 to 284 of this volume.

The practical advantage to the parties in having the motion for judgment *non obstante veredicto* made and considered in the trial court, where the alternative action permitted by the rule is new trial, and where only this discretion can be wisely exercised, is well discussed by Circuit Court Judge Sibley of the 5th Circuit in *Pruitt* v. *Hardware Dealers Mutual Fire Ins. Co., supra,* 112 F. (2d) Advance Sheets 140, 143. See also on this point *Pessagno* v. *Euclid Investment Company,* 68 Washington Law Reporter 753, decided June 15, 1940, by the U. S. Circuit Court of Appeals for the District of Columbia, where a conclusion apparently opposite to that of *Duncan* v. *Montgomery Ward, & Co.*, 108 F. (2d) 848, certiorari granted April 8, 1940, 60 Sup. Ct. 809, was arrived at, construing Federal Rules 50 (b) and 59.

CONCLUSION.

It is respectfully submitted that the errors of the Circuit Court of Appeals above discussed, in holding that the District Court erred in not directing a verdict for the respondent, and in directing a judgment notwithstanding the verdict instead of directing a new trial, are such as to call for review and determination by this Honorable Court.

Respectfully submitted,

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